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No. 88-785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LEASE LIGHTS, INC., JACK R. SEAY, d/b/a SEAY ELECTRIC COMPANY, KNIGHT LIGHTS COMPANY, INC., and PROTECTIVE LIGHTING, INC.,
Petitioners

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Respondent states only that petitioners' case is based upon raising of their electric rate while lowering the rate charged to PSO lighting customers. This misstatement totally ignores the multifarious anti-competitive conduct by PSO upon which plaintiffs base their Sherman Act claims of monopoly and attempt to monopolize. There is much additional unlawful conduct, all of which is substantiated by abundant evidence more than amply sufficient to support the District Court judgment.

Acts are: (1) excluding the plaintiffs from territories and markets; (2) delaying connections to plaintiffs' lights; (3) refusing plaintiffs use of its poles located on private property and outside the city (which were not governed by municipal franchise agreements as erroneously held by the Court of Appeals); (4) taking advantage of its public-utility exemption from licensing and permit requirements to install lights on private property when the plaintiffs had the cost disadvantage of being required to employ licensed contractors and obtain permits; (5) by shifting losses in the lighting busines to non-lighting rate payers, so as to rent lights below cost and at uneconomical prices; (6) use of its monopoly in electricity to gain a competitive advantage in the lighting business. PSO's unlawful inclusion of the lighting business in its public-utility business and rate base gave it an overwhelming advantage in the use of facilities, equipment, personnel and all its many assets. It had a captive clientele consisting of 100% of potential users of lease lights who could use PSO's telephone, facilities, personnel, and billing system to obtain the private, non-utility service of lighting at a price below that which plaintiffs were able to offer.

Thus, it is clear that plaintiffs' injuries were caused not merely by rate discrimination but by PSO's unlawful wrongdoing in the market place. PSO states: "Here, rates became effective only after formal hearings and an independent written determination by the Commission." (Resp. brief p. 11). This procedure requiring an order of the Commission for every rate or tariff, indeed, is prescribed by the Commission rules. (Def. Ex. 3, Rule 5(b)). However, the rates set forth in appendix 1 to Respondent's brief were not approved by Commission orders. None of the rates listed on the first four pages of the appendix (Nos. 1 through 17) is so approved. The first approved rate for

electricity sold to Petitioners or for lights leased by PSO to its lighting customers in the market where competition exists is dated 5-29-75 (Nos. 18, 19, 20). There was not at any time an order approving a rate or tariff for the sale of electricity to electrical contractors such as petitioners. (See Def. Ex. 5 containing all Commission orders). The first rate for which an order could be produced was the 1975 rate (No. 18) which applied to any customer alike and not just light-leasing competitors of PSO.

Even if the Commission had power to regulate the light-leasing business it is clear that there was no attempt to regulate even the utility's light business before 1975. This is significant as to this case which was commenced in 1977, with the damages limitations period extending back to 1973 and evidence of conduct tending to create a monopoly extending back a decade further.

Respondent's quotation of the definition of a gas utility is meaningless, inasmuch as gas has nothing to do with this case. PSO is an electric utility whose business is defined as " . . . production, transmission, delivery or furnishing *electrical current* . . . " (emph added). *Okl. Stat. Title 17,* §151(c). It is obvious that the Legislature, by this enactment (§§151-155) giving the Commission authority to regulate *only the electricity business*, did not "clearly articulate and affirmatively express" an intent to displace competition in every field of commerce employing appliances which utilize electricity. Such a sweeping and broad result is the appalling conclusion from the utility's specious reasoning.

Respondent's overblown reliance upon the word "light" in every statute where it could be found loses sight of the clear statutory definition of an electric utility. If the electric utility monopoly could be extended to include outdoor lighting, then it

also could encompass indoor lighting, and the utility could own and rent every bulb, lamp, fixture, and associated equipment in every household, plant, and office in its service territory. Thousands of businesses who provide such equipment would be forced out because of the impossibility of competing with the favored utility.

Respondent makes an astounding analysis of the antitrust laws when it states: " . . . the state is free to displace any portion of competition which it determines serves state policy." (Br. 14).

PSO argues that a state can give it all the special advantages enjoyed by the utility in its monopoly field, including broad allocation of costs among all rate payers and an allowed rate of return on investment and clothe it with antitrust immunity simply because it is a utility having a monopoly in the electricity business while the state ignores the effect upon the market and leaves other competitors such as the petitioners to struggle on their own against each other and against the overwhelming market forces until they ultimately and certainly perish and die by the state-armored hand of the sole favored leviathan on the field of economic combat.

We do not believe the United States Supreme Court in allowing state-action immunity ever intended that the doctrine be utilized as an instrument of destruction of the many competitors for the sole benefit of the one. The rule was expressed by the plurality and not disvowed by concurring opinions in *Lafayette v. Louisiana Power & Light Co.*, 435 US 389, 413, 55 L Ed2d 364, 98S Ct 1123, (1978):

> " . . . We therefore conclude that the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its

> subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service . . . "

Immunity requires displacement of all competition in the affected area of commerce by regulation, not a favored treatment to one competitor at the expense of all other disadvantaged competitors. The rule urged by the utility would convert the Sherman Act into an engine of destruction for competition rather than its protector and the Magna Carta of free enterprise which it was intended to be.

The declared purpose of the Sherman Act is to preserve free competition among a large number of small sellers and to eliminate monopolies. *No. Pac. Ry. Co. v. U.S.*, 356 US 1, 4, 78 S Ct 514, 2 L Ed2d 545 (1958).

> " . . . this Court emphasized this policy of the Sherman Act by calling attention to the tendency of powerful business combinations to restrain competition by driving out the small dealers and worthy men whose lives have been spent therein . . . " *Von's Grocery Co. v. U.S.*, 384 US 270, 274, 16 L Ed2d 555, 86S Ct 1478 (1966).

> "antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the presevation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our individual freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. *US v. Topco Assoc.*, 405 US 596, 610, 31 L Ed2d 515, 92 S Ct 1126 (1972).

The Court of Appeals and Petitioners cite *Areeda & Hovenkamp, Antitrust Law §212.4b at 132*, but they overlook the full text which states: (as a requirement for immunity for an actor relying on authorization by a state agency) " . . . The agency's action must have reasonably appeared to be lawful . . . in relation to the scope of the agency's authority under state law . . . " It is not credible for PSO to say that it did not understand the clear import of the simple language of *17 O.S. §151(c)*. Under that statute any business outside of "production, transmission, delivery or furnishing electric current" is a separate non-utility business. Certainly, after the decision of the U.S. Supreme Court in *Cantor*—July 6, 1976 (before this suit was filed) PSO was on notice that its separate non-utility private business of lighting could not expect immunity from U.S. antitrust laws. Surely the impact of that decision rippled through the electric utility industry sufficiently to come to the knowledge of Central & Southwestern Corp., and its subsidiaries. If PSO did not know in 1976 that it was not immune, surely it learned from the Oklahoma Supreme Court decision on December 27, 1983; yet, the evidence shows that PSO's anticompetitive conduct continued up through the time of trial of this cause, May 3, 1984.

Respondent argues that the Court of Appeals decision is supportable on other grounds:

A. *Noerr-Pennington Immunity*. This affirmative defense was not raised in the pleadings, pre-trial conference, or trial; therefore it is not available. Such a defense is inapplicable in any event, for petitioners complain only of anti-competitive conduct in the market place, not petitioning for governmental action.,

B. *No specific intent to monopolize*. There was strong proof of intent to monopolize. Intent also may be inferred by

the jury. "Often no evidence of specific intent exists and inferences from conduct are necessary." *Shopping Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F2d 159, 163 (CA10, 1986); *U.S. v. Empire Gas Co.*, 537 F2d, 295, 302 (CA8, 1976). Intent is not a necessary element of monopoly, which was alleged and proved. Nor is intent a necessary element of the use of monopoly in electricity to gain a competitive advantage in the lighting market " . . . Use of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of §2 of the Sherman Act." *Otter Tail Power Co. v. US*, 410 US 366, 35 L Ed2d 359, 368, 93 S Ct 1022 (1973), which also was alleged and proved.

C. *No dangerous probability of success.* The record is bulging with evidence that PSO had the power to control prices and eliminate competition. At least two competitors had been eliminated. The statement of the Court of Appeals of doubt that this element could be proved is based upon that court's erroneous finding that all of the utility's conduct is clothed with immunity.

D. *No relevant product market.* This argument is nothing more than a comment on the evidence. There was evidence of market shares and damages as to every conceivable relevant market. Inasmuch as respondent filed only a motion for judgment n.o.v. and did not file a motion for new trial, the only inquiry is whether there is any evidence reasonably supporting the jury verdict.

CONCLUSION

The Court of Appeals decision that outdoor lighting is a part of the electric utility business within the regulatory power of the commission misinterprets the clear language of state con-

stitutional and statutory provisions and ignores decisions of the Oklahoma Supreme Court. The opinion, which ignores numerous decisions of the United States Supreme Court, constitutes an improper and unsound extrapolation of the doctrine of state-action immunity beyond limits clearly defined by this Court. This decision, if allowed to stand, will bring nation-wide consequences upon the enforcement of the federal antitrust laws. It will expand and accelerate the ever-increasing intrusion of regulated monopolies into fields of private competition. A writ of certiorari should issue to review the decision.

Very respectfully submitted,

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